

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS, WESTERN DIVISION

DR DISTRIBUTORS, LLC, and CB DISTRIBUTORS, INC.)	
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)	
Plaintiffs/Counterclaimant,)	
)	
)	
v.)	Case Number: 3:12 - cv - 50324
)	
21 CENTURY SMOKING, INC., and BRENT DUKE,)	Judge: Frederick J. Kapala
)	
Defendant/Counterclaim Defendant,)	Magistrate Judge: Iain Johnston
)	
21 CENTURY SMOKING, INC.,)	
)	
Counterclaimant,)	
)	
v.)	
)	
DR DISTRIBUTORS, LLC, CB DISTRIBUTORS, INC. and CARLOS BENGOA,)	
)	
)	
Counterclaim Defendants.)	

REPORT TO THE COURT

21 CENTURY SMOKING, INC. and BRENT DUKE (collectively "21CS"), by their lawyers, THOMAS R. LEAVENS, TRAVIS R. LIFE, PETER S. STAMATIS and STEVEN S. SHONDER, for this Report to the Court, hereby state as follows:

1. On September 13, 2018, counsel for defendants submitted a Report to this Honorable Court regarding the Yahoo-Messenger account of Mr. Duke (the "First Report", Doc #268).

2. In the First Report, counsel for 21 Century Smoking, Inc. ("21CS") advised the Court that it was investigating issues regarding Mr. Duke's Yahoo-Messenger account data and to that end, had engaged "4Discovery" (Defendants' e-discovery vendor) to inquire as to whether Mr. Duke's Yahoo-Messenger Account data had been searched in conjunction with 4Discovery's key-word search of his Yahoo email account.

3. We also advised the Court that 4Discovery had come to understand that its key-word search of Mr. Duke's Yahoo Email Account would *not* have included Mr. Duke's Yahoo-Messenger chatting. 4Discovery also determined from the information contained on the Yahoo.com web site that the data on Mr. Duke's Yahoo-Messenger account would be recoverable, even though it has not been used for several years. In reliance on the information on Yahoo's web site, on September 13, 2018, 4Discovery advised that it could recover data from Mr. Duke's Yahoo-Messenger Account and would undertake to do so as soon as possible.

4. The First Report further advised that we expected to "get results within the week" and would promptly produce them.

5. Since submitting that Report to the Court, counsel for 21CS and its consultants at 4Discovery have undertaken extensive efforts to obtain data from Yahoo Messenger. Despite these attempts, which are set forth below, Yahoo has, for reasons unknown to us (or to Yahoo, apparently) not been able to produce the data. By way of

this Report to the Court, we wanted to formally advise Your Honor of our good-faith efforts to track down this data and then to seek the Court's direction regarding further action to be taken.

Actions Taken Since the Issuance of the Report

6. After discovering Yahoo's representation that Yahoo Messenger data could be recovered, counsel directed 4Discovery to pursue recovery of the data through the mechanism provided by Yahoo.

7. On September 13, 2018, Jared Sikorski ("Jared"), a Forensic Investigator with 4Discovery, obtained Mr. Duke's Yahoo Messenger log-in credentials and logged into Mr. Duke's BrentDuke@yahoo.com account. Once logged in, Jared navigated to <https://messenger.yahoo.com> which redirected him to <https://help.yahoo.com/kb/SLN28776.html?redirect=true>. There, he found the webpage titled "Yahoo Messenger will be discontinued," which indicated that though Yahoo Messenger was a service Yahoo was no longer offering, it would be maintaining the Yahoo Messenger chat data at least through November 8, 2018. *See Exhibit 1.*

8. Using this page, Jared then submitted a download request for Mr. Duke's Yahoo Chat history. "Brentduke@yahoo.com" received a confirmation email from Yahoo acknowledging the request and advising that Mr. Duke would be notified when his data is available. *See Exhibit 2.*

9. The following day, on September 14, 2018, brentduke@yahoo.com received an email from Yahoo with the subject, "Download of your data is ready." *See Exhibit 3.* Jared navigated to the specified website to download the zip file which purported to contain the data, but the download failed and instead, Jared received the message "failed – server problem." *See Exhibit 4.*

10. Jared attempted the download several more times, and from different web browsers, each time without success. He also remotely connected to Brent's computer to attempt the same process from Brent's computer, but that did not work either.

Yahoo Support

11. On September 17, 2018 Jared emailed Yahoo support about the issue but received no assistance. On September 19, 2018, Peter Stamatidis contacted Yahoo directly, (now owned by Verizon/Oath) and inquired about obtaining this data and Yahoo assured him that Yahoo Messenger data was generally available for download. He so advised Jared.

12. On September 20, 2018, Jared received correspondence from Yahoo, wherein Yahoo simply provided him with the same download link it had previously published. Jared tried again, and once again, Jared received the "Download of your data is ready" email. Though that download was seemingly successful, this time it simply contained no data whatsoever.

13. On September 21, 2018, Jared telephoned Yahoo Tech Support (1-800-305-7664) and in a call that lasted over 30 minutes, inquired as to why Yahoo produced no data.

14. Yahoo suggested Jared try multiple browsers, which he did, and directed him to update Java, which Jared also did. None of this worked. As result, Yahoo advised that it would escalate the case internally within its tech-support department and promised Jared someone with Yahoo would call him back.

15. Jared did not receive the call back promised by this Yahoo representative.

Yahoo Account Pro Support Engaged

16. On September 24, 2018, Jared signed up for Yahoo Account Pro, a paid-Yahoo-support service, *see* Exhibit 5, and spoke with a tech-support representative named "Yuan."¹ Yuan is believed to be located in the Philippines.

17. Yuan tried, but could not get any of the Yahoo Messenger Data to Jared. Yuan promised Jared that he would look further into the matter, engaged Yahoo's Engineering Team, and assigned the inquiry a case number. Yuan also advised that he escalated the matter to the Yahoo Messenger Team. Yuan promised that Jared would receive a telephone call back in 24-48 hours. Jared did not receive that call back.

¹ Yuan refused to provide his last name.

Yahoo Engineering Team Engaged

18. On September 25, 2018, Yahoo had confirmed the escalation of the matter to its “Engineering Team.” Exhibit 6. On September 26, 2018, Jared contacted Yahoo Account Pro support again. At that time, an unnamed support representative from Yahoo advised Jared that the case had been escalated and Yahoo was continuing to work on it.

19. Jared asked repeatedly to be transferred directly to Yahoo’s engineering team, so he could discuss it with them directly, but that request was refused, ostensibly because that team is located in the United States. However, the support person advised Jared that he was simultaneously chatting on-line with a member of Yahoo’s engineering team about the ongoing inquiry.

20. Yahoo’s Engineering Team advised Jared that there was nothing further Yahoo could do. Jared requested that Yahoo put that in writing. The representative promised to do so, but despite this promise, Jared has received nothing to date.

Yahoo Still Working on It

21. On October 2, 2018, attorneys Stamatis and Leavens called Yahoo Messenger to personally follow up on the issue. They spoke with “Stan,” who also advised he was located in the Philippines. Stan checked with support, put counsel on hold, and despite the prior claim that there was “nothing more” Yahoo could do, advised that Yahoo’s engineers are indeed “still looking into the issue.” Though Stan also

indicated that Yahoo would get back to counsel, he offered no timeframe, other than to say it would happen “ASAP.”

Conclusion

22. No one at Yahoo has told us that the data has been deleted or is *not* retrievable. On the contrary, Yahoo tech-support advised that it is working to figure out how we can get access to it. To that end, in that October 2 call, Leavens and Stamatis asked Stan whether issuing a subpoena to Yahoo for its Messenger data might be a way to “shake loose” the data from Yahoo. Stan said it might be worth a try, but from his vantage point in the Philippines, he couldn’t say for sure one way or another. Of course, Stan’s view that it might be worth a try was his own speculation and there was neither any guaranty given, nor any representation made that a subpoena would get us the data from Yahoo.

23. Although, Yahoo has indicated through its website that Messenger account holders would be provided access to their data until November 8, 2018, we stand ready, willing and able to issue a subpoena to Yahoo, if Your Honor so directs.

Dated: October 10, 2018

21 CENTURY SMOKING, INC. and
BRENT DUKE

By: _____
/s/ Peter S. Stamatis
One of their Attorneys

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